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The essence of development is that a thing may change and yet remain the same. To ask, for instance, whether the uncodified law of to-day is the same as the law at the turn of the century would be like discussing, in the felicitous language of Sir Frederick Pollock, "whether the John Milton who wrote Samson Agonistes was really the same John Milton who wrote Lycidas" It is the same and not the same Every decision of a Superior Court is a step in the process of growth By a process of deduction, by argument from analogy, the existing principles may be made to yield a new principle, which is new because never explicitly stated before, but in another sense not new because it was already involved in what was already acknowledged. In every case there is, in truth, a law applicable to the facts; it is equally the truth that when a decision has been rendered the law is not precisely what it was before. During the year under review, about forty-five decisions of the Supreme Court and almost all decisions of importance of the High Court have been reported in the columns of this Journal. An attempt is made here to refer to the decisions so rendered under some of the titles of law.

COURTS: THEIR POWERS AND JURISDICTION.

In *Venkataraman & Co.* v. *State of Madras*[1], the Supreme Court makes it clear, that, under section 9, Civil Procedure Code, the Courts will have jurisdiction ordinarily to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred; that a suit is expressly barred if a legislation in express terms says so and is impliedly barred if a statute creates a new offence or a new right prescribing a particular penalty or a special remedy; that an inference of the exclusion of the jurisdiction of the civil Courts should not be made generally; and that a suit in a civil Court will lie always to question the order of a tribunal created by statute even if its order is expressly or by necessary implication made final, if the said tribunal abuses its power or does not act under the statute but in violation of its provisions or where the question is whether the executive authority has acted beyond its powers. *Krishnamurthy* v *Chief Engineer*[2] points out that primarily the criminal Courts of the land are entrusted with inquiry into offences, and it is desirable that the findings and orders of criminal Courts should be treated as conclusive in proceedings before quasi-judicial tribunals; but, where an acquittal, is based on a technical ground of criminal processual law and not on merits, subsequent disciplinary proceedings based on the same facts will not be barred

CONSTITUTIONAL LAW.

In *Kareem Sait* v *Deputy Commercial Tax Officer*[3], it is held that where Parliament intends to adopt for purposes of Central legislation any particular provisions of a State law it can do so by reference to those provisions instead of reiterating

1. (1966) 1 M L J. (S C) 108.
2. (1966) 1 M.L.J. 306.
3. (1966) 2 M L J. 397.

them *verbatim*, but it cannot make a law adopting the provisions of a local law which did not exist at the time. *Tamizhazhagan* v *Revenue Divisional Officer, Namakkal*[1], lays down that when examining the character of an enactment the contitutional validity of which is put in issue, the presumption being in favour of its validity, the Court will, if possible, give it such construction as will enable it to have effect, that the Madras Panchayat Act, 1958 disqualifying a person convicted of an offence involving moral delinquency for election as a member of a Panchayat does not discriminate between one class and another where both classes of persons are similarly situated but only classifies persons who have been convicted of such offences; and that such classification is not irrational or repugnant to Article 14 of the Constitution *Buckingham & Carnatic Co , Ltd* v *State of Madras*[2] holds that since under the Madras Urban Land Tax Act, 1963, urban lands in the same sub-zone are made to bear unequal burden in the sense that the burden is not related to the market value of each urban land but to the average market value applied to it, with the result that urban land of lesser market value has to pay a heavier tax than similar land bearing higher value, paying on account of the averaging only a lower tax; that thus the tax charge is not on the basis of indicia or factors relating to the particular land of the assessee but on considerations extraneous thereto, that the charging section is therefore unconstitutional as violating Article 14, and that since the rest of the Act cannot exist independently of the charging section the entire Act is void and unenforceable *Messrs Raval & Co* v *Ramachandran*[3] expresses the view that the Madras Act XI of 1964 under which the ceiling in respect of non-residential tenements specified in section 30 of the Madras Buildings (Lease and Rent Control) Act of 1960 was done away with and the abatement of certain proceedings was provided is not *ultra vires* as offending Article 14 inasmuch as there was no hostile discrimination *Public Prosecutor* v *Mohammad Yousuf*[4] decides that rule 29 of the Prevention of Food Adulteration Rules, 1955 prohibiting the use of coal-tar dye upon any food other than the items specified in that rule is not discriminatory and hence is not violative of Article 14 In *Messrs Raval & Co* v *Ramachandran*[3], as well as in *Tuticorin T & C. Corporation (P), Ltd* v. *State of Madras*[5], it is held that the infraction of Article 358 on Article 19 was only in respect of a law enacted during the emergency and the validity of an earlier law as violating Article 19, could certainly be canvassed. *Tamizhazhagan* v *Revenue Divisional Officer, Namakkal*[1] points out that no one can claim any fundamental right to annoy and injure the feelings of large sections of the public by desecrating or insulting a document embodying the Constitution which they venerate and hold dear and plead that he can do what he pleases with his own property, and that the Prevention of Insults to National Honour Act (Madras Act XIV of 1957) does not violate Article 19 (1) (*a*) or 19 (1) (*f*) or 19 (2) of the Constitution *Muthia, In re*[6] decides that the complete prohibition of trade in *kesari dal* even as cattle fodder by rule 44-A of the Prevention of Food Adulteration Rules, 1955 is not void as offending Article 19 (1) (*g*) since *kesari dal* is found to be a poisonous food-grain the consumption of which would seriously affect the health of the consumers, and, as such, the prohibition would be within the saving clause (6) of Article 19 *Executive Officer* v *Mani Iyer*[7], makes it clear that, when a person applies to a Panchayat for a licence to conduct a hotel, the licence could be refused taking into consideration the hazard or insecurity of possession of the applicant to the site; and such refusal is not violative of Article 19 (1) (*g*) *Vanchesan* v *Messrs Brahmayya & Co*[8] makes it clear that, when in a misfeasance application under section 235 of the Companies Act, 1913 against the directors and officers of a company in liquidation the decree passed against them by the trial Court was varied in respect of some and confirmed in respect of others by the appellate Court, the appellate decree is not one of affirmance and leave under Article 133 (1) (*a*) to appeal to the Supreme Court must be granted on the valuation test being satisfied; and that where the proposed appeal by

1. (1966) 2 M L J 194
2. (1966) 2 M L J 172
3. (1966) 2 M L J 68 (F B)
4. (1966) 1 M L J 393.
5. (1966) 1 M L J 313
6. (1966) 2 M L J 42
7. (1966) 2 M L J 428
8. (1966) 2 M L J. 21.

one of the officers did not satisfy the valuation test still if the question involved in such appeal was common to the other appeal in which leave was granted it would be in consonance with justice to say that the case of such officer would be a fit one for appeal under Article 133 (1) (*e*). *Jagannatha Iyer* v *Jeevan*[1], holds that, where in an appeal arising out of a petition to set aside a sale effected in execution of a decree on the ground of material irregularities in the conduct of the sale the Court remanded the matter for enquiry and fresh disposal to the lower Court, an appeal under Article 133 (1) to the Supreme Court against the order of remand on the ground that the High Court erred in law in holding that there was material irregularity in the conduct of the sale would be incompetent as the High Court's order was not a final order finally disposing of the rights of the parties before it, and hence a certificate under Article 133 (1) could not be granted *Chinnamerkathian* v *Ayyavoo*[2] decides that for purposes of Article 133 (1) (*c*) the term "civil proceedings" are not limited to common law rights only but include any right to property, declaration of status etc, though these may be creatures of statutes, and proceedings before the High Court in revision against an order of the Revenue Divisional Officer for eviction of a cultivating tenant under the Madras Cultivating Tenants Protection Act are "civil proceedings" In *First Income-tax Officer, Salem* v *Short Brothers (P), Ltd*[3], the Supreme Court makes it clear that normally the High Court will not entertain a petition in exercise of its jurisdiction under Article 226 when the party claiming relief has an alternate remedy which is adequate and efficacious; that the question however is one of discretion of the High Court and not of its jurisdiction; and that, if the High Court thought that the case was one in which the jurisdiction may be permitted to be invoked the Supreme Court would not normally interfere with the exercise of that discretion *Lakshmi* v. *Neyveli Lignite Corporation*[4], lays down that the proceedings of a domestic tribunal of a private body cannot be brought under challenge under Article 226, and it is impossible to say that, when an employer is engaged in taking disciplinary proceedings against its employee, it is deciding any rights whatever *Kulla Gowder* v *Board of Revenue*[5], points out that where the order sought to be quashed is not referable to any statutory power or even to an administrative instruction and at the highest can be construed only as a departmental proceeding between the Board of Revenue and the Collector, it could not be struck down in the exercise of writ jurisdiction whether the order was erroneous or not. *Messrs Raval & Co.* v *Ramachandran*[6], holds that on issues of fact, concerning which there is a controversy between the parties the High Court will not embark on a trial under Article 226 In *Venkateswara Rao* v *Government of Andhra Pradesh*[7], the Supreme Court decides that though the right that can be enforced under Article 226 shall ordinarily be the personal or individual right of the petitioner himself, in exceptional cases however a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof, and that a representative of a Committee which was in law the trustees of the amount collected for a public prospose, namely, a Health Centre to be established under the Andhra Pradesh Panchayat Samithis and Zilla Parishads Act, 1955, can file a writ in respect of an order passed relating to the location of the Centre *Chinnaswami Naidu & Sons* v. *First Income-tax Officer*[8], points out that *certiorari* normally goes out to correct errors of jurisdiction whether lack of it or excessive or irregular exercise of it as well as to correct an error apparent on the face of the record other than error of a factual character or violation of the principles of natural justice; that broadly speaking the High Court would be justified in exercising its power under Article 226 where a question of *vires* or constitutional validity of a statutory provision or rule or total lack of jurisdiction of the particular officer or forum or an obviously patent error arises; that where a statute creates a liability and indicates the forum which will determine such liability and sets up a hierarchy of appellate jurisdictions it is but

1 (1966) 2 M L J 494.
2 (1966) 1 M L J. 105
3. (1966) 1 M L.J. (S C) 168.
4 (1966) 1 M L.J. 469.
5. (1966) 1 M L J 44
6 (1966) 2 M L J. 68.
7. (1966) 2 M L J. (S C.) 37
8. (1966) 2 M.L.J. 124.

proper that the scheme of such a statute is not normally or as a matter of course by-passed and interference made either at the original or at any subsequent stage envisaged in the statutory scheme ; that while it is true that the power is wide enough to clothe the High Court with the jurisdiction to interfere even in such cases, the Court should in the exercise of its discretion take into consideration the statutory scheme of remedies and decline to interfere unless the alternative remedies are inadequate and to compel a party to resort to them will amount to speedy justice in the circumstances and would mean grave hardship and harassment and waste of time and money ; and that the High Court would decline to issue a writ against the order of an Income-tax Officer re-opening an assessment under section 34 of Income-tax Act and making additions to the chargeable income *Raja Chidambaram* v. *Rathna Sarma*[1], decides that the power of the High Court to interfere under the Article 226, against an order of rejection of a nomination before the declaration of results of an election, has not been taken away under the Madras Co-operative Societies Act as in the case of elections under the Representation of the Peoples Act ; and hence where a nomination paper has been rejected without jurisdiction and is on the face of it unsupportable in law and the aggrieved party has no other remedy the High Court will not hesitate to exercise the powers conferred on it by the Constitution *Corborandum Universal, Ltd* v *Union of India*[2], states that when a power is entrusted by statute to a named authority and the exercise of it is invoked by the concerned person and there is an improper refusal to exercise the power, in such premises, a *mandamus* may well issue directing the authority to exercise the power ; and that, where an application was made in regard of exemption of dividend income from super-tax under section 99 of the Income-tax Act, 1961, to the Central Board of Revenue and not the Central Government for the issue of a certificate, the High Court can only direct the authority vested with that power to exercise that power and decide according to the merits and the High Court's power will not extend to direct the Central Government to issue the certificate *Murugesan* v. *Collector of North Arcot*[3] decides that a person who has acquiesced in elections to Panchayat being conducted on the basis of the division of wards effected by the Inspector under the Madras Panchayats Act, 1958, though there were no rules regulating such division cannot, later on, after the elections are over, make a grievance of the mode of division of the Panchayat into wards and challenge the elections under Article 226 on that ground *Reserve Bank of India* v *Vasanthi Raman*[4], makes it clear that a writ of *mandamus* will not issue unless a person, corporation or an inferior tribunal has to perform a public duty which that agency neglects or fails to perform, and that where an application for permission in Form P for passage to the United Kingdom by air line was rejected by the Reserve Bank in accordance with principles adumbrated in that behalf the question whether the Court may or may not agree with the policy adopted is irrelevant and no *mandamus* will lie *Rajan* v. *Indian Union*[5], points out that it is well settled now that while the requirements of Article 299 are mandatory and should be complied with in order that an agreement entered into by a private party with the Government in the exercise of its executive power be enforceable it is not necessary that there should be drawn up a formal agreement as such, and there could be a valid contract entered into by correspondence provided the two requirements, namely, (*a*) it should be expressed to be made by the Governor of the Province, and (*b*) it should be executed on behalf of the Governor by such persons and in such manner as he might direct or authorise, are complied with. *Amalanathan* v *Superintendent of Police, Salem*[6], holds that the rule-making power of the President and the Governor under the proviso to Article 309 is not in the nature of subordinate legislation, and subject to the other provisions of the Constitution it is supreme and unrestricted ; that there is no bar to making rules giving retrospective effect ; that the rule-making power is not confined only to regulating the recruitment and the conditions of service of persons appointed after

1. (1966) 2 M L J 415.
2. (1966) 2 M L J 129.
3. (1966) 2 M L J 290
4. (1966) 1 M L J 138.
5. (1966) 2 M L J. 251.
6. (1966) 2 M L J 497

the rules took effect; and that nothing prevents the Governor from making rules, under the proviso with retrospective effect affecting Government servants prejudicially by rules which did not exist at the time of their employment *Viswanathan* v *Rangaswamy*[1], decides that an electoral roll is only a statutory instrument and if prepared in violation of Article 326 would be void from the very inception, so much so, the reception of a vote from a voter who is disqualified on account of non-age would, though his name appears in the electoral roll of the Municipality, be void, and the Election Court would have jurisdiction to hold that the inclusion of the name is a nullity and the vote cast is invalid *Kasinathan* v *Chief Secretary to Government of Madras*[2], lays down that the Proclamation by the President of India under Article 359 suspending the enforcement of the fundamental rights conferred by Articles 14, 21 and 22 during the period when the Proclamation of Emergency is in force by detenues under the Defence of India Act and Rules cannot be invoked as a bar in cases where the detenue contends that his detention is illegal as contravening the mandatory provisions of the Act or that his detention is *mala fide* or that the operative provision of law under which he is detained suffers from the vice of excessive delegation of legislative functions as they are not in terms pleas relatable to the fundamental rights specified in the President's Order *Karunanidhi* v. *Raman*[3], makes it clear that while it is well settled that any claim for relief involving in substance a determination or enforcement of the specified fundamental rights in the Presidential Order dated 3rd November, 1962 issued under Article 359 (1) cannot be considered and granted by Courts, be it under Article 32 or Article 226 of the Constitution or section 491 (1) (*b*) of the Criminal Procedure Code, any relief or claim which does not in any way depend on the enforcement of the specified fundamental rights is not affected by the ban; that a detenue cannot contend that, because his arrest was initially illegal as he was allegedly not informed at the time of his arrest under what authority he was apprehended, his continued detention is illegal as such a plea being relatable to Article 22 of the Constitution is hit by the Presidential Order; that the argument that because the Proclamation of Emergency issued by the President in 1962 was occasioned by external aggression the activities for which a man could properly be detained under the Defence of India Act should be related or correlated to external aggression is clearly untenable, and that once the Proclamation is properly made it extends to all aspects of the security of India, not merely from the standpoint of external aggression but also of internal disturbances, which will cover public safety, maintenance of public order and all peaceful conditions in any part or area in India.

INDUSTRIAL DISPUTES ACT.

In *Management, Syndicate Bank Ltd* v *Workmen*[4], the Supreme Court points out that Banks are entitled to decide on a consideration of the necessities of the banking business whether the transfer of an employee should be made to a particular branch that the Industrial Tribunal should be very careful before it interferes with the orders made by the Bank in the discharge of their managerial functions, that if an order of transfer of an employee is *mala fide* or for some ulterior purpose as for punishing him for his trade union activities the Tribunal should interfere and set aside such order of transfer, but the finding of *mala fide* should be reached only if there is sufficient and proper evidence in support of such a finding, and not capriciously or on flimsy grounds In *Murugan Mills, Ltd* v *Industrial Tribunal*[5], the Supreme Court lays down that the right of an employer to terminate the services of his workmen under the Standing Orders must satisfy the test of *bona fides*, that if the termination was a colourable exercise of the power or victimisation or unfair labour practice the Industrial Tribunal would have jurisdiction to intervene and set aside such termination; and, that section 33 (2) of the Industrial Disputes Act applies to clause (*b*) requiring approval of the action of the employer by the Tribunal only to a case of dismissal for misconduct not connected with the dispute pending adjudication

1. (1966) 2 M L J 560
2. (1966) 2 M L J 53
3. (1966) 2 M.L.J 283
4. (1966) 2 M L J. (S C) 57.
5. (1966) 1 M L J (S C) 9.

and not to the case of clause (*a*) relating to alteration in any matter not connected with the dispute pending or the conditions or service applicable to the workman immediately before the commencement of such proceeding. *Messrs Syamala Studios* v. *Kannu Devar*[1], states that while section 33 (2) no doubt permits an employer to punish a workman or alter his conditions of service in regard to matters not connected with the pending dispute it is essential even in such circumstances that the action of the employer should be *bona fide*.

COMPANY LAW

In *Lakshmi* v *Neyveli Lignite Corporation*[2], it is held that where the employer is a company registered under the Companies Act the fact that the company is wholly Government owned does not alter its character as a company in the eye of the law. *Kothandaraman* v *C I T*, *Madras*[3], points out that the term "manager" as defined in the Companies Act, 1965 includes also a director or any other person occupying the position of a manager by whatever name called and whether under a contract of service or not, that though it may be that a director only by reason of that capacity will not be a servant of the company there is nothing to prevent him from being such servant too under a special contract of service he may enter into with the company, that though the concept of servant may in a sense involve an element of agency, on that account a servant is not to be regarded as an agent; and that an agent is never a servant. In *Public Passenger Service Ltd* v *M A Khadar*[4], the Supreme Court decides that section 155 (1) (*a*) (vii) of the Companies Act allows rectification of the Share Register if the name of any person after having been entered in the Register is without sufficient cause omitted therefrom; that invalid forfeiture of shares is no sufficient cause for the omission of the name of the person holding such shares from the Register, that the Court may refuse relief under section 155 and relegate the parties to a suit only where by reason of its complexity or otherwise the matter can be more conveniently decided in a suit; that the object of the notice under Article 29 of the Regulations is to give the share-holder an opportunity for payment of the call-money, interest and expenses; that a proper notice is a condition precedent to forfeiture; and that a defect in the notice though slight invalidates it and is fatal to forfeiture. *Ambalavana Chettiar* v *Registrar of Companies*[5], makes it clear that even if it be that no penalties are provided for non-compliance with sections 159, 166 and 210 requiring the preparation of the balance-sheet and profit and loss account and placing them before the annual general meeting, that cannot afford justification for the subsequent failure to file three copies of the returns before the Registrar under section 220 (1) (*a*) and 220 (3) of the Companies Act. *Ramachandra Bail* v *Kanniah*[6], expresses the view that where a person was appointed as director on 28th July, 1962, before he attained the age of 65, his appointment is valid and he can act for three years from such date; his continuing to act as director after 24th April, 1965 when an annual general meeting was scheduled to be held at which his turn to retire came but which could not be held due to an injunction from Court would be saved by the provisions of section 280 (2) and by the Second Proviso thereof and would not constitute an offence. *Official Liquidator* v *Raman*[7], lays down that the Report of the Liquidator under section 455 (2) should be of such a nature as will probabilise the opinion of the Official Liquidator that *prima facie* all the directors were concerned in the fraud; that if it was made out on the facts that all the directors were jointly concerned in the fraud it may not be necessary for the Official Liquidator to state which of the directors committed a particular fraud, that the fraud referred to in section 455 (2) as well as in section 478 covers the fraud by any officer of the company in relation to the company; that in the case of the officers the fraud need not relate to the promotion or formation of the company and it will suffice if it is in relation to the company since its formation, that the acts of fraud committed in relation to strangers

1 (1966) 2 M L J. 167.
2 (1966) 1 M L J 469.
3 (1966) 2 M L J. 473.
4 (1966) 1 M.L.J. (S.C.) 23
5 (1966) 1 M L J 48
6. (1966) 1 M L J. 339
7 (1966) 2 M L J. 271

is also within the expression ' in relation to the company '; and that public examination under the provisions of the Act would not amount to " accusation " and is not prohibited under Article 20 (3) of the Constitution.

CONTRACTS AND SPECIFIC RELIEF.

In *Rajam* v *Indian Union*[1], it is held that the enforceability of an agreement between A and B, that the former would render service at a remuneration to be fixed by the latter, depended to a certain extent on the construction of the particular contract and whether such a fixation was entirely within the discretion of the obligee or whether the agreement meant that the obligee should fix the rate the intention of the parties being that the service contemplated was rendered not gratuitously, that if by the contract it is left entirely to the discretion of one of the parties thereto whether or not to pay remuneration the contract would be unenforceable, but if on the other hand the contract is that the service rendered thereunder was not to be gratuitous and that one of the parties should fix the rate, the rate fixed should be just, fair and reasonable, and that if the party so empowered fixes the remuneration at a rate *ex facie* unreasonable and unjust the Court can intercede and fix a reasonable remuneration *S. Sarma* v *Presidency Talkies (P.), Ltd*[2] decides that where a pledgee fails to return the articles pledged, in case the articles have no market value and will be of no use to the owner, the proper measure of damages for their non-return will be the price which the plaintiff decree-holder would get if he sold the articles to a solvent buyer In *Messrs Patnaik & Co* v *State of Orissa*[3], the Supreme Court lays down that a contract for the sale of goods to be manufactured does not cease to be so merely because the process of manufacture is to be supervised by the purchaser ; and a contract for the supply of bus bodies to be built under the specifications prescribed by the purchaser and fixed on the chassis supplied by the purchaser for a fixed price is one for the sale of specific goods and is not a works contract *Allirajan* v. *Govindaswami*[4], expresses the view that where the agreement between the parties was that the firm of partnership constituted by them should run a taxi as its business and that both should contribute towards capital and the agreement contemplated that the permit under the Motor Vehicles Act for the taxi was to be in the name of the defendant the partnership is illegal as offending section 59 (1) of the Act, and, in such a case, one of the partners cannot also ask for restitution of the contribution he had made towards the capital of the partneship from the other In *A Narayanappa* v *B Krishnappa*[5], the Supreme Court points out that the whole concept of partnership is to embark upon a joint venture, and for that purpose to bring in as capital, money or even property including immovable property, that once that is done whatever is brought in ceases to be the exclusive property of the person who brought it in and becomes a trading asset of the partnership in which all the partners would have interest in proportion to their shares in the joint venture of the business, that the person who brought it in would not therefore be able to claim or exercise any exclusive right over the property he has brought in, much less over other property ; that he would not be able to exercise his right even to the extent of his share in the partnership ; that where a partner assigns during the subsistance of the partnership his share to another what the assignee would get is only that which he is permitted by section 29 (1) of the Partnership Act, namely, the right to receive the share of the profits of the assignor and accept the account of profits agreed to by the partners ; and that where a karar executed by a partner recited that as the partnership had come to an end he had given up his share in the "machine etc and the business" and made over to the other partner by way of adjustment and that he himself had been given certain immovable property, the karar cannot be said to convey any immovable property by one partner to another expressly or by necessary implication and does not require, registration for its validity *Parthasarathy Mudaliar* v. *Kondiah Chettiar*[6], states that where the defendants had entered into an agreement to sell

1 (1966) 2 M L J 251.
2. (1966) 1 M L J 154
3 (1966) 1 M L J. (S C) 14
4 (1966) 1 M L J 158
5 (1966) 2 M L J (S C) 60
6 (1966) 1 M L J 90.

two items of property in one lot for a consolidated sum of Rs 5,750, the contract being indivisible, and in a suit for specific performance thereof when it was found in appeal that the defendant had no title to the second item the plaintiff filed a petition stating that he was willing to purchase the first item for the entire contract price and give up his claim for any compensation in respect of the second item, section 16 of the Specific Relief Act (1877) would apply and specific preformance in respect of the first item could be ordered in as much as the relinquishment of the claim to further performance can be made at any stage of the litigation *Deo Kuar* v. *Sheo Prasad Singh*[1], points out that in a suit for declaration of title to property filed when it was under attachment under section 145, Criminal Procedure Code it is not necessary to ask for the further relief of delivery of possession since the defendant was not in possession and not in a position to deliver possession to the plaintiff, and a suit for mere declaration of title would be competent

Property Law

In *Peddu Reddiar* v *Kothanda Reddi*[2], it is held that, though a partition between co-owners may perhaps involve an element of transfer of property in the sense that in the specific properties allotted to a particular co-owner the interest which the other co-owners had previous to the partition is given up, the Transfer of Property Act does not expressly require the transaction to be in writing nor is there any other provision of law requiring such formality *Krishnamachari* v *Dhanalakshmiammal*[3], lays down that under section 55 (6) (*b*) of the Transfer of Property Act the buyer is entitled to a charge on the property as against the seller and all persons claiming under him to the extent of the seller's interest in the property, for the amount of any purchase money properly paid by the buyer, provided he had not improperly declined to accept delivery; and he can be impleaded as a party to a partition suit involving the property under Order 1, rule 10 (2), Civil Procedure Code. In *Ramgopal Reddy* v *The Additional Custodian, Evacuee Property*[4], the Supreme Court points out that in a suit for a declaration by the plaintiff that he is the owner of certain property he cannot take the benefit of section 53-A of the Transfer of Property Act *Venkatasubbiah Chetty* v *Thirupurasundari Ammal*[5], states that an order passed in a proceeding under section 69-A cannot operate as *res judicata* as in such a proceeding the Court has only a limited jurisdiction, namely, to appoint a person as Receiver under the contingencies mentioned in sub-section (2) and has no jurisdiction to adjudicate on competing questions of title and the machinery provided by the section is purely of a summary nature *Muthukrishna Reddiar* v *Ponnuswami Naicker*[6] expresses the view that the object of the notice under section 106 was to give the tenant sufficient time to vacate the premises and that such a notice should be liberally construed; that the real point in such cases is that the person on whom the notice was served should understand that his tenancy had been terminated and that he was required to vacate at the end of the period of his tenancy; and that if the tenant attacked the notice on the ground of vagueness he must show that its defective language caused him to misunderstand its nature *Peddu Reddiar* v *Kothanda Reddi*[2] points out that section 118 refers to cases where two persons owning specific properties transfer or convey their respective ownership one to the other; and that a partition among co-owners is not an "exchange" within the meaning of the section and consequently need not be in writing though it may affect immovable property of the value of Rs 100 or more.

Land Tenures and Tenancy Legislation

In *State of Madras* v *Govindarajulu Naidu*[7], the Supreme Court makes it clear that where a village held in shrotriem tenure continued in the hands of the *nattuvar* (official) and his successors-in-interest after the Permanent Settlement as it had

(*To be continued*)

1. (1966) 1 M L J. (S C) 13.
2. (1966) 1 M L J. 333.
3. (1966) 2 M L J. 298.
4. (1966) 2 M.L.J (S.C.) 90.
5. (1966) 1 M L J 30
6. (1966) 1 M L J 71.
7. (1966) 2 M.L J. (S C) 33.

before such Settlement, and the tenure under the Government became an under-tenure under the zamindar as the latter intervened between the *nattuvar* and the Government, the village was an "estate" within the definition in section 3 (2) (*e*) of the Madras Estates Land Act and hence was an under-tenure estate excluded from the definition of "zamin estate", with the result that the notification issued under section 3 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 by the Government taking over the village is illegal and void *State of Madras* v *Ramaswami Chettiar*[1], holds that "padugai land" signifies the land on the lower-level bank breadth of the river between the edge of the sandy stream bed and the high flood-level bank; that the padugai rising up from the river bed upto the high flood-level bank is not part of the river bed; and that where the Government claims that the "athupadugai" vests under section 3 of the Madras Estates (Abolition and Conversion into Ryotwari) Act, 1948 as river poramboke it must adduce evidence to show clearly the basis on which the claim is made *Valathar Moopandor v Board of Revenue*[2] states that it is clear from section 3 (*g*) that a ryot is entitled only to such rights as were conferred on him under the Estates Abolition Act; that section 11 to which alone a ryot could resort for the issue of a ryotwari patta does not enable him to obtain such patta in respect of a tank as it is manifest from the section that a patta can issue only in respect of ryoti lands, and that a tank is outside the purview of ryoti land *Ratnasabapathy Servai* v. *Sannasi Ambalagaran*[3], lays down that having regard to the hierarchy of judicial tribunals provided for determination of questions of title and right to ryotwari patta under the Estates Abolition Act and the scheme of the Act and its provisions it should be held that the decisions of the officers and tribunals under the Act on matters specifically entrusted to their decision would be final and the jurisdiction of the civil Courts would be barred, that the decision of the Settlement Officer regarding the nature of the land and the grant of patta under section 15 of thelAct is final and conclusive, that in a suit for possession or mesne profits the Court will not be entitled to go into that question; and that under section 15 (1) it is not only the decision of the tribunal on appeal that is made final but also the decision of the Settlement Officer in cases where no appeal has been filed or where an appeal was rejected as out of time. *Ganapathi Sastri* v *Nagammal*[4], decides that under section 3 (*g*) the rights of a person acquired under a decree are wiped out and in their place a new right is given by section 42 under which the only remedy available to a person having a claim against an estate which is abolished is to apply to the Estates Abolition Tribunal for payment of his dues from out of the compensation deposited, within the time prescribed by the section; that the mortgagee of an estate which has been abolished and taken over by the Government under the Act who has obtained a decree for the mortgage debt is entitled to apply for payment of his dues from out of the compensation amount deposited by the Government within the time specified in section 42; that the only requirement is that the claim should not have been barred on the date the estate was taken over; and the fact that before applying for such payment the decree-holder did not put the decree in execution and that consequently the decree was barred by limitation would be of no consequence

In *Sudalaimuthu Chettiar* v *Palaniandavar*[5], the Supreme Court makes it clear that before a person can be regarded as a "cultivating tenant" within the meaning of the definition of the term in the Madras Cultivating Tenants Protection Act, 1955 as amended in 1956 he or the members of his family must contribute his or their own physical labour; that a person can be properly regarded as a member of his wife's family and not merely of his father's family, and that a son-in-law of a deceased tenant holding a power of attorney from his mother-in-law and his wife (heirs of a deceased tenant) contributing his physical labour is sufficient to render the wife and daughter of the deceased "cultivating tenants" within the meaning of the expression in section 2 (*ee*) of the Act *Mangulathachi* v *Kalyanasundara Mudaliar*[6] points out that to confer the status of a "cultivating tenant" under the Act the

1 (1966) 1 M L J 402
2. (1966) 1 M L J 354
3. (1966) 1 M L J. 190.
4 (1966) 1 M L J. 430
5 (1966) 1 M L J. (S C.) 7.
6 (1966) 2 M L.J. 49.

tenancy agreement must be with the landlord, that a usufructuary mortgagee being a person entitled to possession only till redemption cannot confer on any one the right to be in possession for a longer period, and that a lessee under a usufructuary mortgagee is not entitled to claim the rights of a "cultivating tenant" as against the mortgagor subsequent to the redemption of the mortgage *Srimanavedan* v *Maniyayi*[1], holds that a person may continue to be a "cultivating tenant" even though physical possession may be with somebody else, that unless the tenant establishes by clear evidence that there has been a surrender of the land by her, the landlord can seek his remedy for eviction only against the cultivating tenant; that the mere fact that the tenant sets up a defence that she is not the cultivating tenant does not justify the landlord's application being dismissed; that the Revenue Court under the Act like any other judicial tribunal is governed by the Evidence Act and cannot make use of statements recorded behind the back of parties; that when a dispute arises as to whether a particular party against whom an eviction petition is filed is the tenant or not it is a matter which the Court itself must decide; and that the Rules like 4 and 8 framed under the Act do not empower the Revenue Divisional Officer to make a report on a matter which he himself has to decide *Narayana Padayachi* v *Sundaralingam*[2], makes it clear that section 3 (1) affords protection to cultivating tenants from eviction by the landlord despite a decree or order of Court; that such protection is not available to a cultivating tenant who has "altogether ceased to cultivate the land"; and that this expression in section 3 (2) (*b*) has reference not merely to the physical act of stopping cultivation but to an intention never to revert to cultivation on the land. *Pethaperumal Maistry* v *Perumal Maistry*[3], states that where the Court had fixed a particular date for the payment or deposit of arrears of rent the tenant will have the whole day and not till 5 P M only on that day to comply with the direction, that an order for eviction passed on that very date is not sustainable, that if the Court had made the eviction order on the next day the order would be unassailable, and that rule 8 (1) of the Rules framed under the Act provides for the hearing and disposal of an application under the Act by the successive officers presiding over the Court. *Mohamad Hussain Rowther* v. *Kasaiyya Sholagar*[4], expresses the view that the term "maintain" means keep up or preserve and does not include reclamation of land and it is not open to a cultivating tenant to call upon the landowner under section 3 (6) of the Cultivating Tenants (Payments of Fair Rent) Act to reclaim a land which has been damaged by erosion or silting up due to floods, and that the capital expenditure referred to in the sub-section is only in respect of the maintenance of the land and not its reclamation *Rasan Muthirian* v *Periaswami Muthirian*[5], points out that whether it is the landlord or the tenant who wants to get possession of the leased property they should show whether the extent is more than 6 2/3 acres or less, that, when there is a dispute as to extent in a suit by the tenant in a civil Court for an injunction against his landlord from interfering with his possession, the proper thing would, be to transfer the suit to the Revenue Court for giving a finding whether the plaintiff seeking the injunction is in possession of more than 6 2/3 acres, and that after the receipt of the finding the civil Court may dispose of the suit according to law and on the merits *Kothanda Pillai* v *Devaraja Reddy*[6], decides that section 4-A (5) of the Cultivating Tenants Protection Act fixes not merely a ceiling in respect of the extent with reference to which his right to resume personal cultivation is given but also draws a line on time so that any change subsequent thereto in the circumstances of the landlord is made ineffective to disturb the protection afforded to the cultivating tenant, and that, if the vendor from whom the petitioner purchased the lands in 1963 owned land exceeding 13 1/3 acres or was paying tax of the type specified in section 4-A (4) and had therefore no right to resume, the petitioner by reason of his subsequent purchase would be in no better position *Rama Iyer* v *Sundaresa Ponnapoondar*[7], makes it clear that where the tribunal found summarily

1. (1966) 1 M L J 437.
2. (1966) 2 M L J 577
3. (1966) 2 M L J. 141.
4. (1966) 2 M.L.J. 312.
5. (1966) 1 M L J. 308
6. (1966) 1 M L.J. 164.
7. (1966) 2 M.L.J. (S.C.) 78.

that the applicant was not a "cultivating tenant" of the respondent and on such finding declined to exercise the jurisdiction vested in it the High Court could set aside the decision under section 115 (*b*) of the Civil Procedure Code read with section 6-B of the Cultivating Tenants Protection Act, and that the High Court can on a review of the entire evidence conclude that the applicant was a "cultivating tenant" and grant relief accordingly

INCOME-TAX LAW

In *C I T, Andhra Pradesh* v *H E H Mir Osman Ali Bahadur*[1], the Supreme Court lays down that under the Indian Income-tax Act an individual is assessed to tax on the income computed in accordance with the provisions of the Act of the previous year at the rate or rates fixed for the year by the Annual Finance Act; and that if during the assessment year an individual is assessable to tax, the fact that during the previous year he was not liable to tax at all because there was no Income-tax Act in the area to which the Act was extended or because under an Income-tax Act in force therein during that year his income was exempted from tax or because of any other law including International Law he was so exempt from tax would not be of any relevance In *H E H Nizam's Religious Endowments Trust* v. *C I T, Andhra Pradesh*[2] the Supreme Court holds that it is settled law that the burden is on the Revenue Authorities to show that an income is liable to tax under the statute, but the onus of showing that a particular class of income is exempt from taxation lies on the assessee, that the words "applied or finally set apart for application" in the second part of section 4 (3) (i) indicate that unless the income from the property is applied or finally set apart for the purposes within the taxable territories the income does not earn the exemption, and so, where under a deed of trust created by the Nizam, settling securities of the face value of 40 lakhs of rupees, the trust fund was to be accumulated during the life time of the Settlor and after his death the trustees were to hold the said fund upon trust to spend the income therefrom for one or more of the four religious and charitable objects mentioned therein, two of which being for purposes within the taxable territories and two for purposes outside such territories, and the settlor is still alive, the income from the trust was not entitled to exemption In *C I T, Madras* v *P. K N Company Ltd*[3], the Supreme Court points out that the determination of the question whether in purchasing and selling land the taxpayer, a company, enters upon a business activity depends upon the facts and circumstances, and neither the purpose nor the object for which the company is incorporated nor the fact that a single plot of land alone was acquired and thereafter sold as a whole or in plots nor the profits motive of the company in entering into the transaction would by itself be decisive, and that where the primary object of the company was to take over the assets of a firm to carry on the business of planters and to earn profits by sale of rubber, the incidental sale of uneconomic or inconvenient plots of land or houses could not convert what was essentially an investment into a business transaction in real estate. In *First I T O., Salem* v *Short Brothers (P) Ltd*,[4], the Supreme Court makes it clear that in the context of the legislative history of section 2 (6-A) (*c*) of the Income-tax Act, 1922 "current profits" *i e*, profits of a company in liquidation arising after the end of the last previous year and before liquidation commenced are brought within the network of taxation as dividend, that "capital gains" under section 12-B are chargeable in respect of any profits arising from transfer of "capital assets" and "capital assets" do not include lands from which the income derived is agricultural income, that profits derived by the transfer of lands from which the income derived is agricultural income would not therefore be chargeable on a combined reading of section 12-B with section 2 (4-A) under the head "capital gains", that "accumulated profits" are profits which are so regarded in commercial practice and "capital gains" as defined in the Act, that realisation of appreciated value of assets in commercial practice is regarded as realisation of capital rise and not as profits of the business, and that unless appreciation in the value of capital assets is

1. (1966) 1 M L J (S C) 96
2. (1966) 1 M L J (S C) 163
3. (1966) 1 M L J (S C) 149.
4. (1966) 1 M L J (S C) 168.

included in the capital gains, distribution by the liquidator of the rise in capital value will not be deemed dividend for the purpose of the Act. *Chinnaswami Naidu & Sons* v. *First I.T O , Coimbatore*[1], states that the question of interpretation of section 2 (6-A) (*e*) being entirely within the competency of the Income-tax Officer or the Appellate Assistant Commissioner their decision cannot raise any question of jurisdiction or irregular exercise of it. *Srinivasan* v. *C. I. T* , *Madras*[2], decides that the doctrine that under the Hindu Law a son conceived is in many respects equal to a son born does not fit in with the scheme of the Income-tax Act , and that the income derived from property acquired from property allotted at partition will be the income of the assessee as an " individual ", and that position cannot be displaced by the birth of a son which brought into existence a Hindu undivided family *Kothandaraman* v *C. I. T* , *Madras*[3], holds that the doctrine of ' real income ' in the context of commercial expediency cannot be extended to the receipt of or accrual of salary which is liable to tax under sction 7; that where the salary had accrued to the assessee under the contract of service immediately upon the closing of the account year and the agreement did not provide for the waiver of any part or whole of the remuneration and did not reserve any power to the employer to decide that the assessee should forego any part of the remuneration which had accrued to him, any such denial, withdrawal or waiver subsequent to such year would not preclude the assessment of the amount under section 7 as salary. In *C I T* , *Madras* v *Best & Co (P.) Ltd* [4], the Supreme Court decides that where a multi-agency concern had one of its agencies, namely, that for distribution and marketing of explosives in certain areas in South India terminated and compensation agreed to be paid subject to its accepting a restrictive covenant for a certain period the compensation was not only for the giving up of the agency but also for accepting the restrictive covenant, that such part of the compensation as was attributable to the restrictive covenant would be a capital receipt and hence not assessable to tax ; that the apportionment of the compensation has to be made on a reasonable basis between the loss of the agency in the usual course of business and the restrictive covenant , and that the manner of such apportionment has perforce to be left to the assessing authority. *C I T* , *Madras* v. *Speed A Way* (*P*) *Ltd* [5], states that the main provision, namely, section 10 (2) (*vi*) allows deduction of depreciation , that in construing the proviso to that clause depreciation of building, machinery, plant or furniture under the clause should be regarded as standing on the same footing and as being of the same nature as the rest of the allowance permitted by section 10 (2) , that the proviso does not stand in the way of treating the unabsorbed depreciation under the head of business being set-off under section 24 as a loss against other heads of income or profits , and all that the Proviso (*b*) to section 24 provides for is that business losses other than carried forward depreciation should be first set-off and they will have priority over depreciation within the scope of Proviso (*b*) to section 10 (2). *Chittoor Motor Transport Co.* (*P*) *Ltd* v. *I T O.*[6], Points out that the object of granting development rebate was to help in the development of industry and to achieve the object the condition is imposed that if the assessee did not utilise it in his own business the rebate would be deemed to be forfeited or deemed to have been allowed wrongly; that the transfer of buses by a limited company to the partnership firm is a sale coming within the purview of section 10 (2) (*vi-b*) whether the transaction resulted in a profit to the company or not , that rebate is allowed on the same conditions for every assessee, one such condition being that if the assessee sells before the expiry of ten years from the end of the year in which the bus was acquired to a person other than the Government he would forfeit such rebate , and as such section 10 (2) (*vi-b*) is not repugnant to Article 14 of the Constitution. *Gnanambika Mills* v. *C.I.T.*, *Madras*[7], expresses the view that where sales of yarn had been made by the assessee ostensibly to its employees and villagers at a rate fixed by the Mill Owners Association but the sales at such rates were however disbelieved by the Department and regarded as cana-

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1. (1966) 2 M L J 124
2. (1966) 1 M L J (S C) 27.
3. (1966) 2 M L J 473
4. (1968) 1 M L J (S C) 134.
5. (1966) 1 M L J. 53
6. (1966) 1 M L J (S C) 39.
7. (1966) 1 M L J 416

lised through the employees to the ultimate purchasers at open market rates without showing the excess profits realised by the assessee in the books of account, the amount cannot be regarded as bonus paid to the employees for purposes of claiming deduction under section 10 (2) (*x*) In *Narayanan Chettiar* v *C I T*, *Madras*[1], it is held that where the assessee, a Hindu joint family doing money-lending business, was also a partner by its karta in a firm doing business in exports and imports contributing a capital of Rs 10,000 according to the partnership deed and under the arrangement was also advancing moneys at 6 per cent interest to the firm and similarly withdrawing moneys from time to time, and on the dissolution of the firm a sum of Rs 78,974 was payable to the assessee in respect of such transactions, and as part of the arrangement of dissolution the assessee became entitled to certain sums of which he could realise only a portion and was also allotted a certain amount as liability which he had to discharge, the claim in respect of Rs. 78,974 would be allowable under section 10 (2) (*xi*) as bad debt while the other sums would be treated as capital loss and not allowable *Messrs Sanjeevi & Co* v *C I T.*, *Madras*[2], states that the jurisdiction of the Revenue under section 10 (2) (*xv*) is confined to deciding the reality of the expenditure, namely, whether the amount claimed by way of deduction was factually expended or laid out and whether it was wholly and exclusively for the purpose of the business, and once the conclusion was reached in favour of the assessee deduction of the amount should follow as a matter of course and it is not for the Revenue to embark upon business considerations and the reasonableness or otherwise of the quantum of expenditure In *India Cements Ltd* v. *C. I. T.*, *Madras*[3], the Supreme Court expresses the view that stamp, registration fee and law charges incurred in borrowing on the security of fixed charges is revenue expenditure under section 10 (2) (*xv*) because the loan obtained was not an asset or advantage of an enduring nature and the expenditure was made for securing the use of money for a certain period and that it was irrelevant to consider the object with which the loan was obtained. *India Motor Parts & Accessories* v. *C.I T.*, *Madras*[4], points out that under section 13 income, profits and gains shall be computed for the purpose of sections 10 and 12 in accordance with the method of accounting regularly employed by the assessee ; that one of the recognised methods of valuation of stock of articles for which there was a falling market would be 50 per cent less than the cost ; that the mere fact that occasionally a solitary item was sold for a price higher than the cost price would not detract from the nature of the system , and that the 50 per cent. reduction was made not for the reason that as and when any of the items was sold it would fetch a price less than the cost but that the sale of these items is very slow. *Messrs Mysore Fertiliser Co* v. *C I T*, *Madras*[5], decides that, in determining the income by estimate, the Income-tax Officer should make the assessment according to rules of reason and justice and according to law and not according to his humour or arbitrarily , and that it is open to the High Court under section 13, on a Reference, to consider whether the method adopted by the Income-tax Officer was wrong in the sense that the method is not one which is likey to result in the true profits and gains being ascertained. *S. S Sivan Pillai* v. *C. I T.*, *Madras*[6], expresses the view that, in computing the profits or gains for the purpose of section 15-C (1) and (4) which is to be done only in accordance with section 10, the only allowances that could be made in respect of current profits are current year's depreciation under section 10 (2) (*vi*) and current year's additional or extra depreciation under section 10 (2) (*vi-a*) , that the set-off of losses under section 24 (2) and allowances in respect of unabsorbed depreciation both under section 10 (2) (*vi*) and section 10 (2) (*vi-a*) would not enter into computation under section 15-C (3); that, though it is true that when the net result of the assessment is taken there is nil profit and there might be no occasion at all for the application of section 15-C it does not follow from it that on that ground the benefit of that section can be denied to the shareholders, if on the computation of the profits and gains of an industrial undertaking under section 15-C (3) the company had made profits out of which dividends

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1 (1966) 1 M L J 10
2. (1966) 2 M L J 269
3. (1966) 1 M L J (S.C.) 31.
4 (1966) 1 M L J 59.
5 (1966) 1 M L J 20
6. (1966) 2 M L J. 468.

had been paid to its shareholders. *K. T. M. S. Mohmood* v. *C. I. T., Madras*[1], holds that for the purpose of section 16 (3) it is immaterial that property transferred by the husband to the wife is converted into another form of asset *M/s Indian Commerce & Industries Ltd* v *C I T, Madras*[2] lays down that for the purpose of applying the provisions of section 23-A the Income-tax Officer should put himself in the arm chair of the Board of Directors and decide in the way of a reasonable and prudent man of business having regard to the particular facts and circumstances and business exigencies whether the payment of a further or larger dividend than that declared would be unreasonable, that it is not enough if he considers that a larger dividend would be reasonable; that the words "having regard" to losses in the previous years and smallness of profits in the relevant year are not a limiting factor but only indicate that the two facts should necessarily be taken into account, that profit in the context of smallness of profit meant not assessed profit but book or commercial profits to be ascertained on the basis of the balance-sheet and if necessary even by going behind it, and that there is no rule that only compulsory reserve should be taken into account in computing commercial profits *East India Corporation, Madras* v *C I T, Madras*[3], makes it clear that where the Tribunal in appeal was only concerned with the propriety of the order under section 23-A and not concerned with the consequences of the order the direction by the Tribunal, to reassess the shareholders as a consequence of section 23-A proceedings would be without jurisdiction and the Tribunal and the Court are not bound by the administrative directions issued by the Board of Revenue. *Siddhi Vinayagar & Co* v *C.I T, Madras*[4], expresses the view that where a firm was not found to be bogus or non-existent the mere fact that one of the partners brought the share capital from the funds of another firm and took back his profits in the firm to the other firm for division between its partners will not disentitle the assessee to registration under section 26-A *Kaloogala Estate* v. *C I T, Madras*[5], states that the expression "particulars of income" in section 28 does not signify individual detail but includes also the overall effect achieved by any improper method adopted by the assessee, and that, where the assessee introduced an imaginary loss which it took in reduction of the profits of the trading and as a device for concealing the particulars of the income, the levy of penalty is proper *Gnanambika Mills* v *C I T, Madras*[6], points out that the provisions in section 28 as well as the nature of the penalty indicate the character of the proceedings as penal, that the burden of proof is on the Department to show that there has been a concealment or deliberate furnishing of inaccurate particulars of the income, and that section 28 contemplates an independent proceeding which is not concluded by an order of assessment or any other observations contained therein *Chinnaswami Naidu* v *First I T. O, Coimbatore*[7], states that the jurisdiction to reopen an assessment is conferred under section 34 on the Income-tax Officer, and the question of interpretation of section 2 (6-A) is entirely within his competency. *Chidambaram Chettiar* v *C I T, Madras*[8], holds that two conditions must co-exist for invoking the jurisdiction to reassess under section 34, namely, the Officer must have reason to believe that there has been an under-assessment and that such under-assessment has resulted from non-disclosure of material facts by the assessee, and it is not necessary that the omission or failure by the assessee and the escape of income from assessment should be found as a condition precedent *Venkatarama Chettiar & Sons* v *C I T, Madras*[9], lays down that there is no general proposition that irrespective of circumstances affidavits and accounts should as a rule be relied upon as representing the truth regarding disclosure of particulars as to income, and that the credence to be attached to such evidence depends on the appreciation of the particular circumstances, the parties who produce them and the value to be given to such evidence In *C I. T., Andhra Pradesh* v *H E H Mir Osman Ali Bahadur*[10], the Supreme Court makes it clear that under section 41 the Revenue has the option to levy or collect tax from the trustee or the beneficiary; that the expression "all the provisions of

1. (1966) 1 M L J 515
2 (1966) 1 M L J 49
3. (1966) 1 M L J 215
4. (1966) 1 M L J. 512.
5. (1966) 1 M L J 23.
6 (1966) 2 M L J 462
7 (1966) 2 M L J 124
8 (1966) 2 M L J 452
9 (1966) 1 M L J 527
10. (1966) 1 M L J (S C) 96.

this Act apply accordingly " in that section indicates that there is no distinction in the matter of assessability of the income in the hands of the trustee or the beneficiary as the case may be, and that section 41 comes into play only after the income has been computed in accordance with Chapter III of the Act. In *M CT. M Chidambaram Chettiar* v. *C. I T , Madras*[1], the Supreme Court decides that, under section 44-D though the person who transfers assets is not designated, emphasis is laid on the consequences flowing from such transfer, that if the assessee acquired the right to enjoy the income by reason of such transfer he is liable to tax, that if a resident has the power to enjoy the income accruing or arising from the assets transferred to a non-resident he would be deemed to have received that income and as such liable to tax, that the quality of chargeability under the section is referable only to the income from the assets transferred during the year in which it is sought to be assessed and it is not necessary that the income at the time of the transfer should have been liable to be assessed, and that the burden of proof that the transfer was not for a purpose to avoid tax-liability but was a *bona fide* commercial transaction would be upon the assessee *C I T , Madras* v *Indian Bank Ltd*[2], expresses the view that for the purposes of rule 3 of the Income-tax (Double Taxation Relief) (Indian States) Rules framed under section 49-A what is meant by " any part " and " that part " is that there should be identity of the source and identity of income, and if that test was satisfied the relief against double taxation could be allowed under rule 1. *India Cements Ltd , Madras* v *C I. T , Madras*[3], points out that in a Reference the High Court must accept the findings of fact made by the Appellate Tribunal and it is for the person who has applied for the Reference to challenge those findings by an application under section 66 (1), and that if he has failed to file an application expressly raising the question about the validity of the findings of fact he cannot urge before the High Court that the findings are vitiated for one reason or another. *Gnanambika Mills Ltd* v *C I. T , Madras*,[4] holds that in calling for a Supplementary Statement of the Case under section 66 (4) the High Court could require the Tribunal to include in such Statement only such material and evidence as might already be on the record but which had not been included in the Statement of the Case made originally under section 66 (1) or section 66 (2), and that it had no jurisdiction to direct the Tribunal to collect additional material and make it a part of the Supplementary Statement. *Chinnammal* v *Kumudhini*[5], decides that a statement made by the executant of a promissory note before an Income-tax Officer cannot be disclosed by such Officer by reason of the prohibition contained in section 137 (1) of the Income-tax Act of 1961, that the prohibition is absolute, and that the liberty given by sub-section (5) to the maker is not a liberty extended to the Court or the public servant. *Somasundara Nadar & Sons* v. *Second Income-tax Officer, Virudhunagar*[6], makes it clear that under the main part of section 187 (1) where at the time of making the assessment it is found that a change had occurred in the constitution of the firm the assessment shall be made on the firm as constituted at the time of assessment, that under the first proviso thereto the income of the previous year for the purpose of inclusion in the total income of the partner be apportioned between the partners who in such previous year were entitled to receive the same, and that the omission to make such apportionment will not nullify the validity of the order of assessment of the firm on the basis of section 187 (1), though it is true that the proviso contemplates that by following the apportionment of the income the liability to pay taxes in the first instance is on the partner so far as his share of the income is concerned. *Mahomed Thaha* v *First Income-tax Officer, Nagapattinam*,[7] points out that where money was in the custody of a criminal Court having been deposited there by the police after seizure on suspicion and subsequently the police dropped the action and refund of the money as belonging to another person —a tax defaulter was—sought, a payment-out application filed by the Income-tax Department under section 226 (4) has to be allowed even without the consent of

1 (1966) 1 M L J (S C) 154
2. (1966) 1 M L J 521
3. (1966) 1 M L J. (S.C) 31.
4. (1966) 1 M.L.J. 516.
5 (1966) 1 M L J 213
6 (1966) 1 M L J 514
7. (1966) 1 M L J. 277.

the assessee. *Corborandum Universal Ltd.* v *Union of India*[1], states that the Central Board of Revenue reconstituted as the Central Board of Direct Taxes cannot be considered as the Central Government for the purposes of the Fifth Schedule to the Act.

HINDU LAW.

In *Thirumal Reddiar* v *Koppiah Reddiar*[2], it is held that while the burden of proving an adoption is initially on the party asserting it, where the defendant himself has admitted in a series of documents that the plaintiff was the adopted son of *A* the burden of proving that in fact there was no such adoption shifts to the defendant and what he had admitted will be presumed to be true unless rebutted. *Venkatasubramania Iyer* v *Eswara Iyer*[3], lays down that property acquired by a member of a joint family from the savings of the joint family income given to him by the manager without liability to account for any balance after he has maintained himself would not be partible as between the acquirer and the other members of the family, but the character of such acquisition in the hands of the acquirer *vis-a-vis* his male children would not be the same, that an intention to benefit the family by spending the income of separate property for family purposes cannot be treated as an intention to transfer the property itself to the joint family though where the income from the joint family and personal earnings are mixed together and acquisition made such acquisition should normally be held to be joint family property, that the right of a Hindu father to make a gift of a reasonable portion of ancestral immovable property commensurate with the status and wealth of the family to the daughters even years after their marriage is well recognised, that the moral obligation of the father to make such a gift would devolve on his accredited representatives in the family on his failure to do so and they could make the provision, that where the father while effecting partition retained certain properties claiming them as his self-acquisitions when really they were joint family properties and subsequently made a gift of them to his married daughters different considerations would apply; and that even in such a case in view of the moral obligation of the father or any one else who took his place the Court may, where justice and equity so demand uphold the settlement and effectuate the gift by equitable adjustments. *Peddu Reddiar* v. *Kothanda Reddi*[4] decides that an oral partition between co-owners is valid in law, and though in a sense there is an element of transfer in it the transaction is not an exchange and need not be evidenced by registration *Rajalakshmi* v. *Ramachandran*[5], points out that one important change introduced by the Hindu Minority and Guardianship Act in the pre-existing Hindu Law is that by section 11 the Act has taken away completely the powers of a *de facto* guardian to bind the minor's estate by alienations of immovable property in case of necessity or for the benefit of the minor's estate, and an alienation by such guardian would be null and void and cannot bind the minor; that the mere fact that a person gifts property to a minor will not entitle that person for that reason to appoint a guardian for the minor in respect of that property though it will be open to the donor to provide for the management of such property by resorting to a trust, and that a lawful guardian has to obtain the Court's sanction to relinquish his guardianship during his lifetime and his powers as guardian of the property of a minor could not be taken away by a third party, even if he should be willing, without an order of the Court. In *B. S. Lokhande* v *State of Maharashtra*[6] the Supreme Court makes it clear that the essentials of a valid marriage among Hindus including the *gandharva* form are the invocation before the sacred fire and *saptapadi* unless otherwise authorised by custom ; that the word "solemnise" in section 17 of the Hindu Marriage Act means "to celebrate with due ceremonies and in due form"; and that the second marriage contemplated as an offence under that section must be a valid marriage performed in accordance with the requirements of law applicable to a marriage between the parties *Rajathi* v. *Selliah*[7], holds

(*To be continued*)

1. (1966) 2 M L J 129.
2. (1966) 2 M L J 155.
3. (1966) 1 M L J. 471.
4. (1966) 1 M.L.J. 333.
5. (1966) 2 M L J 420
6. (1966) 1 M L J. (S.C.) 92.
7. (1966) 2 M.L.J. 40.

that Hindu Law recognises only three forms of marriages, namely, shastraic, customary or statutory; that a marriage not in conformity with any of these forms cannot be valid even if it is done with certain forms and principles of a reformers' movement, that an association of persons cannot legislate to lay down a procedure which could result in a valid union between two spouses, and that a marriage solemnised according to a movement known as self-respectors' movement is not a valid marriage *Subbarama Reddiar* v. *Saraswathi Ammal*[1], expresses the view that where matrimonial relief is sought on the basis of adultery there must be a high degree of proof which would make the guilt or the erring spouse certain to the mind of the Court, and that adultery can be regarded only as a question of fact. *Valliammai Achi* v. *Singaram Chettiar*[2], states that the words "living in adultery" in matrimonial suits under section 10 (1) (*f*) and section 13 (1) mean a continuous course of adulterous life as distinguished from one or two lapses from virtue. *Sathappa Chettiar* v. *Ammaponnu*[3], lays down that from a decree passed under section 13 (2) (1) a second appeal would be competent, that the mere fact that the wife's petition for divorce was filed 5 years after the coming into force of the Hindu Marriage Act will not disentitle the wife from getting the relief on the ground of unnecessary or improper delay in filing the petition, that the petitioner who applied for divorce on the ground of the husband having a first wife living when he married the petitioner as his second wife before the commencement of the Act will not be disentitled to the relief even if she was living in adultery at the time of the petition, and that she can be disqualified for relief by reason of her conduct only where such conduct was in some way responsible for the matrimonial wrong committed by the husband. *Narayanaswami Reddiar* v. *Padmanabhan*[4] holds that there is in law no such status as that of an illegitimate wife, that section 25 of the Hindu Marriage Act cannot be construed to mean that notwithstanding the nullity of the marriage the woman retains the status of a wife for applying for alimony and maintenance; that the section only means that where the question of nullity is in issue and is contentious the Court will proceed on the assumption till the contrary is proved that the applicant is the wife, and that as regards section 18 (2) of the Hindu Adoptions and Maintenance Act it obviously refers to a case of a woman who has been validly married. In *Rajagopala Rao* v. *Sitharamamma*[5] the Supreme Court decides that a claim for maintenance by a Brahmin woman who became the concubine of a Sudra while her husband was alive and bore him children as an *avaruddha stree* under the Hindu Law as it stood in 1948 cannot be defeated on the ground of her being a Brahmin and her paramour a Sudra. *Santharam* v. *Ramanuja Reddiar*[6], lays down that under section 20 of the Hindu Adoptions and Maintenance Act a father is bound to maintain his illegitimate child so long as he is a minor i.e., so long as he has not completed 18 years, but where a decree for maintenance had been obtained by a minor illegitimate son represented by a Court guardian prior to the coming into force of the Act the minor will not become a major on completing 18 and will continue to be a minor till he completes 21 even if in the meanwhile the Hindu Adoptions and Maintenance Act had come into force, and as such, an execution petition to enforce the decree relating to a period after attainment of 18 and before completion of 21 will be competent as the Act is intended to have operation in addition to and not in derogation of the Guardians and Wards Act, 1890 *Ramaswamy Goundar* v. *Baghyamal*[7], expresses the view that section 28 of the Hindu Adoptions and Maintenance Act specifically dealing with the effect of a transfer of property so far as it relates to *dependents* does not mean that the right of a wife (who is not a *dependent* within the definition of the term in the Act) in case of a transfer falling within the purview of section 39, Transfer of Property Act is abrogated; that section 28 does not purport to deal with the wife's right to maintenance and is only confined to *dependents*, that a Hindu wife is still entitled to rely on section 39 of the Transfer of Property Act, and that where an alienation is made of the husband's property with

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1 (1966) 2 M L J 263.
2. (1966) 2 M L J 425
3. (1966) 1 M L J. 102.
4. (1966) 1 M.L J. 529.
5 (1966) 2 M L J (S C) 17.
6 (1966) 2 M L J 546
7. (1966) 2 M L J 579.

notice of the wife's right to maintenance she can proceed against the alienated property to the extent necessary. *Ayi Ammal* v. *Subramania Asari*[1], lays down that the word "inherited" in section 15 (2) of the Hindu Succession Act is not used in any loose sense and would not govern the devolution of properties which a deceased woman had obtained by gift or settlement from her parents, and that on the death of a Hindu widow childless and intestate, the properties gifted to her by her father during her lifetime devolves on the heirs of her deceased husband under section 15 (1) and not on her father's heir under section 15 (2)

EVIDENCE.

In *Pattammal* v *Munuswami*[2], it is held that admissions made to a police officer under section 162, Criminal Procedure Code, can be used against the maker in proceedings under section 488 of the Code under section 21 of the Evidence Act and are not prohibited by section 25 of the Act which comes into play only where a person is accused of an offence *Padmavathi Ammal* v *Maruthachalam Pillai*[3], decides that when once it is established that the several steps as required under Order 21, rule 54 (2), Civil Procedure Code, have been in fact taken a presumption can be made under section 114 of the Evidence Act as to the regularity of the steps proved to have been taken, and that the presumption does not come in however when there is no evidence that the act has been performed or when the evidence let in does not warrant an inference of performance *Subramanian Chettiar,* In re[4], states that the protection afforded by section 124 against disclosure of statements made by public officers in official confidence extends not only to communications by one official to another but also to communications made by private persons to a public officer in official confidence, and that before the privilege under that section can be claimed in respect of statements made by persons in an enquiry under Police Standing Order 145, the nature of the enquiry should first be determined and the statement of every witness considered individually to find out whether they were made in official confidence *Antony* v. *G S Naidu*[5], points out that the privilege in respect of professional communications between an Advocate and his client is intended only to protect the interest of the client in respect of any act of prosecution for any prior act or offence and the privilege is not intended to commit any offence, and hence a defamatory imputation about a person made in the instructions to his Advocate will not be a privileged communication.

LIMITATION.

In *Ramaswamy Iyer* v *Brahmayya & Co*[6], it is made clear that the liability of a legal representative of a deceased director of company originates from and entirely depends upon the liability of the deceased, so much so, a representative would have all the defences that were open to the deceased and could rely upon any period of limitation which the deceased could have maintained, and the liability being that of the deceased, the representative could not rely upon any limitation which the deceased himself could not have urged. *Hilal Press* v. *Sri S S. S. C S. Devasthanam*[7], holds that though the question of excusing delay in particular cases is in the discretion of the Court concerned, if the Court finds that there has been gross negligence on the part of the litigant and gross delay which could not be explained, it cannot exercise its discretion to condone the delay, and it would make no difference in principle if the suitor is an institution or corporated body or the Government. *Kaveri Chettiar* v. *Firm of P. A. S Chettiar etc*[8], expresses the view that where the delay in the presentation of the appeal was due to its having been wrongly presented in another forum *bona fide* and on advice of Counsel, if after excluding such time the appeal is within the period of limitation that would constitute sufficient cause within the meaning of section 5 of the Limitation Act. *State of Madras* v. *Mohammad Sirajuddeen*[9], points out that, where under the rules the production of a copy of the judgment is dispensed with in a batch of appeals, still, the date of the judgment and

1. (1966) 1 M L J 411.
2. (1966) 1 M L J 540.
3. (1966) 1 M L J. 413.
4. (1966) 2 M L J. 529.
5. (1966) 2 M.L J. 443.
6. (1966) 1 M L J 234
7. (1966) 2 M L J 323
8. (1966) 1 M L J 435.
9. (1966) 2 M L J. 380.

the time requisite for obtaining a copy of the decree should be the basis of the computation of limitation with reference to each of the appeals, that the time for preferring an appeal should be calculated on the endorsements on the copies of the judgment produced in each of the appeals even if they are filed in a batch and in one of them alone such copies are produced and in the rest their production is dispensed with; and that delay may be excused in such cases in the liberal exercise of the discretion of the Court *Pratapchand* v. *Lakshman Prasad Gupta*[1], decides that the word "prescribed" both in section 14 and section 15 will include also cases of limitation prescribed by general statutes and is not confined only to those under Schedule I of the Act *Seshadri Iyengar & Sons* v *Doraiswamy Iyer*[2] states that when an employee has taken a loan from his employer and as per the agreed terms of repayment has been crediting a part of his salary towards the loan in the books of account maintained by him for his employer and such entries are made in his own handwriting, the entries will amount to "payment" within the meaning of section 20 (now section 19) and it is not necessary that the money should have first passed to the debtor-employee from the employer and thereafter physically paid by the employee before making the entry in the account *Netaji Bus & Lorry Service* v *Gurumurthy*[3], lays down that a suit for compensation for non-delivery of goods by a carrier through whom the goods were despatched would be governed by Article 31 (now Article 11) and time would begin to run after a reasonable period had elapsed on the expiry of which the delivery ought to have been made In *Venkata Subba Rao* v *State of Andhra Pradesh*[4], the Supreme Court makes it clear that Article 62 (now Article 24) applies to suits for refund of surcharges or taxes illegally collected by the Government and not by Article 120 (now Article 113), that the former Article applies wherever the defendant has received money which in justice and equity belong to the plaintiff under circumstances which in law, render the receipt of it a receipt by the defendant to the use of the plaintiff, that to attract Article 62 (now Article 24) it is not necessary that at the moment of the receipt the defendant should have actually intended to receive the money for the use of the plaintiff; that the Article would be inapplicable where the defendant occupies a fiduciary relationship towards the plaintiff, that in all cases where a more specific Article is applicable like Article 96—mistake, Article 97—consideration which fails, etc Article 62 (now Article 24) would be inapplicable even if the claim could have been comprehended under the omnibus caption of "money had and received", and that where the right to refund does not arise immediately on receipt by the defendant but arises by reason of facts transpiring subsequently Article 62 (now Article 24) cannot apply for it proceeds on the basis that the plaintiff has a cause of action from the very moment of receipt. In *Venkataraman & Co* v *State of Madras*[5], the Supreme Court holds that a suit for refund of sales tax filed in the civil Courts within three years of the date of knowledge of the mistake which led to the payment would be within time under Article 96 (now Article 59) *Gurbinder Singh* v *Lal Singh*[6], points out that in a suit to which Article 144 (now Article 65) is attracted the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of suit, and for computing this period he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of independent trespassers. *Venkatammal* v *Muthukrishna Naidu*[7], states that where the daughters of a Hindu female had been kept out of possession of stridhana property which they inherited under the pre-1956 Hindu law from their mother on her death for more than 12 years by their brothers adversely to them, a suit for possession filed by the surviving daughters on the death of one of the daughters, the death occurring after all the daughters had been ousted for more than 12 years, would be barred by limitation not only in respect of their own shares but also in respect of the share which belonged to the deceased daughter *Soodamania Pillai* v *Diraviam Pillai*[8], expresses the view that where a total stranger redeems the property subject to a usufructuray mortgage

1 (1966) 2 M L J 235
2 (1966) 1 M L J 204
3 (1966) 1 M L J 170
4 (1966) 1 M L J (S C) 42
5 (1966) 1 M L J (S C) 108
6 (1966) 2 M L J (S C) 8
7 (1966) 1 M L J 64
8 (1966) 2 M L J 308.

and gets into possession thereof without the consent of the mortgagor such possession will be adverse to the mortgagor and a suit for possession against such person will be governed by Article 144 (now Article 65) as it will not be a case of transfer by the mortgagee within the meaning of Article 134 [now Article 61 (*b*)] or a case of redemption of the mortgage as it had already been redeemed by the stranger. *Sheik Ali* v *Sheik Mohamed*[1] points out that Art 181 (now Art 137 is the only Article that can apply to the execution of a foreign judgment under section 44-A (1) of the Civil Procedure Code, that time would run from the date of filing a certified copy of the foreign decree in the District Court in India, there being however no limitation for filing such certified copy, and that the law of limitation as contained in the Limitation Act as a procedural law and as *lex fori* will apply independently of section 44-A (1) to the execution in India of a foreign judgment of a Supreme Court in a reciprocating territory.

CIVIL PROCEDURE CODE.

In *C Subbanna* v. *K. Subbanna*[2], the Supreme Court makes it clear that a pure question of law not dependent on the determination of any question of fact can be urged at any stage of a litigation even if it be in the Court of last resort, that an appellant cannot at the hearing of an appeal claim a right to urge a new point not taken in the grounds of appeal but can make a separate application for permission to take up such a point, and that a direction in a preliminary decree ordering an enquiry into mesne profits up to the date of delivery of possession, merely because no appeal was preferred from the preliminary decree, cannot operate as *res judicata* for the simple reason that the direction is not based on any matter in controversy between the parties but is given in the exercise of the Court's discretionary power under Order 21, rule 12 (*c*) and does not preclude the judgment-debtor from contending at the time of passing the final decree that mesne profits cannot be awarded for a period exceeding three years from the date of the preliminary decree In *Vaithilingam Pillai Charities* v. *Vijayavalli Achi*[3], the Supreme Court states that a decision can operate as *res judicata* only if such decision was necessary for the purpose of the case in which it was given *Shanmugham* v *Angalammal*[4], decides that an order passed on an application for execution of something not directed by the decree without specific notice to the judgment-debtor of the relief prayed for will not operate as *res judicata*, and that, where a preliminary decree in a mortgage suit had directed a sale of the hypotheca free from encumbrances but the decree-holder in execution of the decree sought for the sale of the hypotheca subject to encumbrances in favour of a third party and the prayer was granted, the order made by the Executing Court would not operate as *res judicata* against the judgment-debtor so as to preclude her from filing an application under section 47, Civil Procedure Code, to set aside the sale. *Pushparaj* v *Saraswathi Ammal*[5], lays down that where a promissory note was executed within the territorial jurisdiction of a Court and the debt was guaranteed outside the jurisdiction, a suit against the guarantor will lie within the jurisdiction of that Court since the guarantee has no existence apart from the debt based on the promissory note *Sheik Ali* v *Sheik Mohamed*[1], expresses the view that section 44-A (1) of the Code is confined to the powers and manner of execution of foreign decrees and has nothing to do with the law of limitation; that the fiction created by the sub-section by the words " as if it had been passed by the District Court" is designed only to attract and apply to such execution by the District Court its own powers of execution and the manner of it in relation to its decree and without reference to any question of limitation , that the whole purpose of the fiction is to fix or determine the particular District Court in India to execute the decree or judgment of the foreign Court; and that section 44-A (1) does not require the filing of a non-satisfaction certificate as a condition for the District Court to assume urisdition. *Padmavathi Ammal* v. *Maruthachalam Pillai*[6], points out that since a

1. (1966) 2 M L J 346 (F B)
2. (1966) 1 M L J (S C) 67
3. (1966) 2 M L J (S.C) 48.
4. (1966) 2 M L J 448
5. (1966) 1 M L J 159
6. (1966) 1 M L J 413.

private purchase after an invalid attachment in execution of a decree would not be affected by section 64 the title of the private purchaser in such a case would be paramount and he would not be bound by the subsequent execution proceeding leading to the sale of the property in favour of the Court auction-partchaser, and section 47 can have no application to such a case. In *G Veerayya* v. *N. S. Chowdhary*[1], the Supreme Court makes it clear that generally a new plea of fact not set up in the plaint cannot be allowed to be raised for the first time in appeal. *Muhammad Abdul Razack* v. *Syed Meera Ummal*[2], holds that the general rule is that an appellant cannot be allowed to raise in his memorandum of appeal a new ground or any objection which if it had been taken in the trial Court might have been cured by appropriate amendment or otherwise, that it is true that there are exceptions to the rule like question of law, question of limitation, *res judicata* etc. which can be substantiated on the facts already on record, but a matter which though of law depends upon a question of fact for its determination cannot be raised for the first time in appeal. *Subbarama Reddiar* v. *Saraswathi Ammal*[3], states that the High Court in second appeal arising from a suit for judicial separation has no jurisdiction to proceed into a question of fact and reassess the evidence and reach a different conclusion even if it is of the view that the finding is erroneous ; that unless there is some error of law or application of law to the facts of a fundamental character, any interference in second appeal with the judgments of the Courts below will not be justified ; and that the question whether any principle of law arises in second appeal can only be argued on the basis of facts as established by the record and accepted by the trial Court and the first appellate Court. *Narayana Padayachi* v. *Sundaralingam*[4], states that a finding as to whether during the absence of a cultivating tenant his sons were in fact cultivating the lands is one of fact and the finding cannot be disturbed in second appeal. *Dhanapalan* v *Assistant Collector, Dindigul*[5], decides that under section 26 (2) of the Land Acquisition Act, by reason of the Amendment in 1921, the award of the Court on a reference under that Act has to be deemed to be a decree of the civil Court ; that all the consequences of a decree, unless expressly limited, will follow , and the award can if the circumstances warrant, be reviewd by the Court under section 114 and Order 47 of the Code. *Veerappa Thevar* v. *Kathaswami Chettiar*[6], holds that section 115 is available only when there is no appeal to the High Court and that if an appeal lies even by way of a second appeal the High Court could not entertain a revision under that section. *Jagannatha Prasad Gupta* v *Ranganatha Konar*[7], decides that though a revision under section 115 is not incompetent against an order in which there is no appeal directly or indirectly, to the High Court, the High Court, would, rarely interfere when a regular appeal is provided for under the Code to a subordinate Court since to do so would mean bypassing a statutory provision for an appeal. *Dhanapal Chetti* v. *Avva Kannaiah Chetti*[8], expresses the view that there is no scope for the admission of additional evidence and for the consideration of such evidence in a revision proceeding. *Krishnamurthi Ayyar* v *Govindaswami Pillai*[9], makes it clear that the exercise of any inherent power must be consistent with sound general principles of law and cannot override the rights of parties , that it is the birthright of a man to claim that there shall be no trespass to his person unless provided by law ; and that there is no warrant in the procedure now obtaining in the civil Courts under the Code for an order for compulsory medical examination of a party against his wish. *Srimathi Periyathayya* v *Narasinga Rao*[10] decides that, where a suit was properly filed but under the Madras Building Lease and Rent Control Act as amended by Act XI of 1964 the suit had to abate and the Madras Court Fees and Suits Valuation Act did not contemplate the refund of Court-fee in such cases, the Court can issue, in the exercise of its inherent power, a certificate of cancellation of the stamp and return the plaint to enable the party to apply to the Government for refund *ex gratia*. In *Krishnamachari* v. *Dhana-*

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1 (1966) 2 M L J (S C) 92
2 (1966) 1 M L J 550
3 (1966) 2 M L J 263
4 (1966) 2 M L J 577
5 (1966) 1 M L J 302.
6 (1966) 1 M L J 427
7 (1966) 1 M L J. 451
8 (1966) 2 M L J 389
9 (1966) 2 M L J 383
10 (1966) 2 M L J 159

lakshmi Ammal[1], it is held that Order 1, rule 10 (2) confers a very wide jurisdiction which it is neither feasible nor advisable to confine within the strait jacket of an inflexible formula, that the words "all questions involved in the suit" in the sub-rule are not restricted to questions between the parties to the litigation but will include questions between the parties to the suit and even third parties in proper cases; and that a stranger, in whose favour an agreement for sale of one of the properties involved in the suit for partition had been executed by a coparcener who had also received a part of the purchase money, may be impleaded as a proper party. *Sanjeevi Devar* v *Manicka Devar*[2], states that it is now well settled that a Court should adopt a liberal attitude in allowing amendment of pleadings unless the nature of the amendment is such as to alter the basis of the suit or introduce a new ground; and more so, in cases where the pleadings are drafted in an alien language with the accurate use of which the parties are not familiar, and that where, denying in substance, the execution of a promissory note the defendant stated in the written statement that he did not consciously execute the note, an amendment of the statement to delete the word 'consciously' ought to be allowed as it only makes clear that the execution of the note is denied *Lydia Margaret Santhanam* v *David Thamburaj*[3], holds that the test for allowing applications for amendment of plaints would be not merely whether a new cause of action is introduced but whether, if it is allowed, the defence would be thereby in any way prejudiced either by deprivation of a plea of limitation or any other plea, and that a new cause of action may well be allowed to be taken by way of an amendment provided it is an alternative plea and the defence is not prejudiced in any way *Subramania Chettiar* v *Shanmugham*[4], points out that a right to make a counter-claim is a statutory right and such a claim is not admissible in a case which is admittedly not within Order 8, rule 6, and that unless the rules of procedure of the particular Court or Courts provide for counter-claims, the defendant has no unqualified right to set up a plea which is essentially in the nature of a counter-claim *S A Azoozkhan* v *D A O Southern Railway*[5], makes it clear that Order 21, rule 4 is a special provision to be applied where the transfer of a decree is sought from the decreeing Court to a Court of Small Causes, that its provisions have also to be complied with by the Court which passed the decree before it proceeds to transfer the decree for execution, that if the amount of the decree exceeds its pecuniary value set down in Order 21, rule 4, the decreeing Court cannot either *suo motu* or on application by the decreeholder transfer the decree for execution to the Court of Small Causes but it should transfer the decree to some other Court like the City Civil Court. *Padmavathi Ammal* v. *Maruthachalam Pillai*[6] lays down that with reference to every one of the steps to be taken under Order 21, rule 54 (2) the language used is imperative, that the requirements of rule 54 (1) and 2 are mandatory and every one of the prescribed things must be done before an attachment could be said to have been made for section 64 to come into operation *Mohamed Mustafa Maracayar* v. *Udainachi Ammal*[7], states that, in granting permission to the decree-holder to bid and set-off, the Court should act cautiously after due inquiry into all the attendant circumstances, and that, since it is not a matter of course but a discretion to be judiciously exercised, it is desirable that the order should specify the grounds on which the permission has been granted particularly where the objections thereto have been overruled *Uzhappaligal Munnani* v *Ganesan*[8] expresses the view that the term "irregularity" in Order 21, rule 90 means "not being in conformity with the law or any recognised rule", that the material irregularity complained of must be one on the part of the Court or its officers and it should be shown that there has been a positive disregard of some positive provision of law relating to execution, and that, where the judgment-debtor did not assist the Court in arriving at a proper valuation but allowed the sale to proceed and actually the property was sold for a price higher than what was anticipated by the judgment-debtor,

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1 (1966) 2 M L J 298
2 (1966) 1 M L J 561
3 (1966) 1 M L J 408
4 (1966) 1 M L J 200.
5 (1966) 2 M L J 5
6 (1966) 1 M L J 413
7 (1966) 1 M L J 373
8. (1966) 2 M L J 90

it cannot be said that any substantial loss or injury could have occurred merely because the value stated in the sale proclamation was far lower than the price fetched in the sale *Vaidyalingam Pillai* v. *Chidambaram Pillai*[1], holds that under Order 21, rule 90, the applicant should prove material irregularity or fraud in the publication or conduct of the sale, that the mere fact that the property was worth much more than what it was sold for is no ground to set aside the sale, that where the judgment-debtor had notice at every stage of the execution proceedings and the application for reduction of the upset price but did not choose to oppose any of them, he cannot be heard to say after the sale is effected, that the price fetched was too low, and that, where at the time the proclamation of sale was settled the judgment-debtor did not raise any objection to the description of the property therein and only wanted time to pay the decree amount allowing the sale however to be proceeded with, he cannot at a later stage be allowed to take advantage of any *bona fide* error in the description to attack the sale *Eleaverthi Nadipabha* v *Elavarthi Venkataraju*[2], states that Appellate Courts should be slow and cautious to exercise the powers under Order 23, rule 1 and permit a defeated plaintiff to withdraw his suit with liberty to institute a fresh suit and reagitate the matter over again, and that, when the defect, if any, could be cured by an amendment, the Court should not ordinarily permit the withdrawal of a suit with liberty to file a fresh suit *Unnamalai Ammal* v *Ramaswami*[3], points out that the Court has power under Order 33 to declare pauperism in respect of payment of probate duty under section 57 of the Court Fees Act of 1955 and the proviso to that section making an exception in the case of the Administrator-General and enabling him to pay the probate duty at a time subsequent to the stage fixed by the Court makes no difference to the principle. *Sathar* v. *Sergappa Goundar*,[4] holds that where the plaintiff who had filed a pauper suit died pending disposal of the same and his sons on their own application were added as legal representatives and plaintiffs the fact that the sons had means to pay Court fees would not be a ground for dispaupering them and directing them to pay Court fees, and that, where the parties come on record not in the place of the deceased but in their own capacity and continue the suit, it may make a difference whether such parties as plaintiffs have the necessary means to pay Court fees *Vanchesan* v. *M/s Brahmayya & Co*[5], expresses the view that the provisions of Order 45, rule 4, cannot directly apply to separate matters in the same misfeasance application.

PENAL CODE.

In *Appu Nair* v *Earnest*[6], it is pointed out that every unlawful commitment to confinement will not by itself warrant the legal inference of malice, and that, in order to bring a case under section 220 of the Penal Code, it should be alleged and proved that the person in office corruptly and maliciously confined a person wrongfully *Advocate-General* v *Amanullakhan*[7], holds that the essential ingredients of an offence under section 228 are (*a*) intention, (*b*) insult or interruption to a public servant and (*c*) the concerned servant sitting at that time in same stage of a judicial proceeding, and that if the averments go beyond that and scandalise the Court itself and further impair the administration of justice they would amount to contempt of Court and not merely to an offence punishable under section 228 *Komaraswami* v. *State*[8] expresses the view that from a comparison of the ingredients of the offences under sections 285 and 435 it is clear that the *actus reus* for the offence under section 285 would be established in every case where the *actus reus* for an offence under section 435 is established, but the *mens rea* for the two offences are different, that there could be a conviction under section 285 though the accused were charged only under section 435 having regard to the provisions contained in section 237, Criminal Procedure Code, and that if prejudice is likely to be caused by such a conviction there could be a re-trial *Natarajan*, In re[9] states that section 304-A is no

1 (1966) 1 M L J. 441
2 (1966) 1 M L J 359
3. (1966) 1 M L J. 163.
4. (1966) 2 M.L J. 1.
5. (1966) 2 M.L J. 20.
6 (1966) 1 M L J 436
7 (1966) 2 M L J 219.
8. (1966) 1 M.L J. 385.
9. (1966) 1 M.L.J. 328.

exception to the general principle of criminal jurisprudence that in regard to offences under the Code apart from special statutes which may embody special presumptions the innocence of a person is to be assumed till the guilt is established, that there is no presumption that a person should have driven a motor vehicle in a rash and negligent manner merely because there was an accident; that there could be no general presumption that the fact that the car leaves the road is evidence of rash and negligent driving, and that whether a person is guilty of rash and negligent driving is a question of fact. *Kuppuswamy*, In re[1] makes it clear that for an offence under section 409 not only must there be an initial entrustment of goods but there should be a subsequent dishonest conversion of the goods to the use of the concerned accused; that the bare fact of the disappearance of certain goods with not an iota of evidence about the handling of those goods by the accused or their disposal by him is not sufficient for the purpose; and that criminal liability cannot be based upon conjecture or probabilities *Jawaharlal*, In re[2], takes the view that, where an offence falls within the scope of section 16 (7) of the Pawnbrokers Act, 1943 and section 409 of the Penal Code, the offender can be proceeded against under both, and the Pawnbrokers Act does not in any way repeal or modify, the Penal Code to the extent to which that Act makes a specific provision for any offence *Subrahmanian* v. *Mani*[3], decides that to constitute trespass under section 441 the entry upon the property should be with the intent to annoy, intimidate or insult, that the natural consequence of the entry is likely to cause annoyance is not sufficient, and that where the accused entered upon a piece of land in the honest belief that he had a right to enter the same for cremating the body of a relation ignoring the protest of the person claiming to be in occupation as frivolous and the accused was strengthened in his belief by a resolution of the Panchayat, though incorrect, he is not guilty of an offence under section 441 *Thangavelu Chettiar* v *Ponnammal*[4], points out that describing an unmarried woman as the concubine of a particular person is *per se* defamatory unless the maker of the statement had reasonable belief or the statement was made in good faith, that the burden of proving that the accused comes under any of the exceptions to section 500 is on him; and that filing a copy of the plaint in Court in which such a statement is made is publication within the meaning of the section.

CRIMINAL PROCEDURE CODE

In *Nagammal* v *Mani*[5], it is held that under section 145 (1), Criminal Procedure Code, before promulgating a notification the Magistrate must be satisfied that a dispute likely to cause a breach of the peace exists concerning property within his jurisdiction, and in his order he should state the grounds of his being so satisfied; and that even where the Magistrate relies on the information laid by the police the order should show that the Magistrate had applied his judicial mind to the information and reached the conclusion that he should take action under section 145 (1). *Safdar Hussain* v *Abdul Rahim*[6], lays down that under section 155 (2) where, on the same set of facts, both a cognisable and a non-cognisable offence would appear to be involved the police investigating the cognisable offence can also investigate the non-cognisable offence and take action thereon, that the police may competently file a report in respect of the non-cognisable offence under section 200 (*aa*); and that under section 190 the Magistrate can take cognisance of even non-cognisable offences upon report made in writing by a police officer without examining the officer on oath *Pattammal* v *Munuswamy*[7], takes the view that admissions made to a police officer under section 162 during the course of an investigation into an offence will not be inadmissible in a proceeding launched by the wife against her husband under section 488 of the Code *Raja Goundan*, In re[8], points out that section 202 does not contemplate the dismissal of a part of the complaint and holding an enquiry about the truth of the remaining part; that a dismissal of a complaint

1. (1966) 1 M L J 409
2. (1966) 1 M L J 281.
3. (1966) 2 M L J 99.
4. (1966) 1 M L J. 547.
5. (1966) 2 M L J 96
6. (1966) 1 M L J 331
7. (1966) 1 M L J 540.
8. (1966) 2 M.L.J. 518.

can be made only under section 203 and that it is improper to dismiss a complaint even in part when the enquiry under section 202 is still pending. *Sivanesan* v. *Subbiah*[1], lays down that a Magistrate should assess the evidence in the case at every stage when he has to pass an order, though the nature of the assessment should necessarily vary on account of the presence or absence of the accused and other circumstances; that at the stage of enquiry under section 203, though no doubt the evidence of the complainant and his witnesses is not tested by cross-examination, the averments in the complaint and the evidence can certainly be assessed to find out whether there are material contradictions or improbabilities which would bear on the truth or falsity of the case, and that under section 203 the Court has jurisdiction to dismiss a complaint if on a consideration of the complaint and the evidence it feels that there is not sufficient evidence to put the accused on trial. *Appu Nair* v. *Earnest*[2], states that it is open to a Magistrate to invoke section 347 (1) and commit the accused to the Court of Session at any stage of the proceedings if he thinks that the case is one which ought to be tried by the Court of Session *Chinnappa*, In re[3] makes it clear that section 337 (1) expressly authorises a First Class Magistrate to tender pardon to any person in order to get a full and true disclosures of circumstances within the knowledge of such person relative to the offence under investigation, that an order tendering pardon to a person on the basis of a statement made by him relating to the offence before another Magistrate under section 164 will be in compliance with the statutory requirements; that there is nothing in the Code which compels a Magistrate tendering pardon to examine the person again in full and record his confessional statement again when he is satisfied that such person has already made a true and full disclosure of the circumstances, and that normally the High Court will not interfere with the exercise of the power of tendering pardon by the lower Court *Raja Goundan* In re[4], points out that the principle of *autre fois acquit* enacted in section 403 has been held applicable to cases of statutory acquittal under sections 247, 248, 345 and 494 of the Code, that where a complaint has been dismissed even at the stage of an enquiry under section 202 and the stage of issue of process to the accused has not been reached it cannot be said that such a dismissal will be a bar to a fresh trial of the accused within the meaning of section 403 *Samidurai* v. *Thangavelu Udayar*[5], takes the view that section 407 (2) conferring a power on the District Magistrate to transfer appeals to a Magistrate of the First Class subordinate to him cannot give jurisdiction to the Sub-Divisional Magistrate to deal with an appeal under section 476-B. *Palaniswamy Gounder* v. *Nataraja Gounder*[6], states that section 422 does not contemplate any notice to the complainant in an appeal by the accused against his conviction, and strictly speaking it would be perfectly legal to order notice only to the Public Prosecutor, but where an order for compensation has been made in favour of the complainant principles of natural justice require that notice should go to the complainant, and that it is desirable that the appellate Courts should see that the notice ordered to the complainants in such cases are served or at least reasonable attempts are made to serve them before disposing of the appeals *Mohamed Ali* v *Ramdas*[7], lays down that under section 439 the High Court can as a Court of revision exercise any of the powers conferred on a Court of appeal under sections 423, 426, 428 etc , that under section 423 (1) (*d*) an appellate Court may make any amendment or any consequential or incidental order that may be just or proper, that where an order section 522 is made for the delivery of an immovable property to the complainant after the conviction of an accused is set aside in revision, the incidental or consequential orders would be those which follow as a matter of course, being necessary complements to the main order, that the High Court has also inherent power under section 561-A to make such orders as may be necessary to give effect to any order passed under the Code or to prevent abuse of process of any Court or to secure the ends of justice , and that an order passed under section 522 is revisable *Govindaswami Mudaliar* v *Muthulakshmi Ammal*[8], holds that there is nothing in section 488 to bar the remedy under

1 (1966) 1 M L J 556
2 (1966) 1 M L J 436
3. (1966) 2 M.L.J. 445
4. (1966) 2 M.L.J. 518.
5 (1966) 2 M L J 146.
6 (1966) 2 M L J 149.
7. (1966) 1 M.L.J 535.
8. (1966) 1 M.L.J. 208.

it because of the existence of a civil Court decree for maintenance; that if there is a finding by the civil Court as to the status of the parties that there was no relationship of husband and wife between the parties it would obviously bar the criminal Court from entertaining a petition under section 488; but if a decree for maintenance passed by a civil Court is unexecutable or unrealisable for any reason, as for instance, where it is found that the defendant has no means to pay or has become an insolvent the only remedy for the decree-holder is to resort to section 488 *Amirthammal* v. *Marimuthu*[1], decides that the word ' child ' in the context of section 488 connotes an idea of infancy and means a minor whether under the Indian Majority Act or the Court of Wards Act or the Guardians and Wards Act, and it cannot include a person of whatever age who is unable to maintain himself or herself merely because he is a child of his father. *Thanikachalam Pillai* v. *Dakshayani Ammal*[2], lays down that before an order for maintenance under section 488 made in favour of a wife could be cancelled it should be established that she was leading a life of continued adulterous conduct and that a single lapse from virtue cannot amount to living in adultery. *Sakuntala* v. *Thirumalayya*[3] points out that the forum for the institution of suits under section 488 by a wife against her husband is the Court of the Magistrate having local jurisdiction over the local area where the respondent resides or last resided with his wife. *Phillip Ulrich* v. *Chellam Sanyasi*[4], decides that where an order was passed under section 516-A in respect of property alleged to be concerned in a case of theft directing it to be handed over to the accused on his executing a bond stipulating that the bond would be cancelled if the charge-sheet was not filed within a certain date, and the bond got cancelled by reason of the time fixed under it, the Court can still order in a case filed against him subsequently that the accused should produce those properties if they still remained with him *Thangaswami Pillai* v. *State*[5], takes the view that, where it is clear that a pledgor had no title at all to pledge the goods and the property had been obtained by him by unlawful means and the pawnbroker had not taken any precaution to fortify his position by necessary enquiries about the antecedents of the pledgor and where he got the jewel from and so on, it will be a proper exercise of discretion for the criminal Court to direct, after the conclusion of the trial of the accused, the return of the goods to the real owner who had been deprived of it by unlawful means.

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1 (1966) 2 M L J 506.
2 (1966) 1 M L J 282
3. (1966) 2 M.L J. 326.
4 (1966) 2 M L J. 240.
5. (1966) 1 M.L J. 538.